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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 431

ARVIL R. HARDCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Petitioners,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of D. L. Rhodes, J. Adornetto and ~~Jack~~ Dan Banta in Opposition

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Argument	7
Conclusion	10

CITATIONS

Cases	Pages
Colbert v. Brotherhood of Railway Trainmen, 206 F 2d 9 (C.A. 9)	10
Ford Motor Co. v. Huffman, 335 U.S. 330	7
Steele v. Louisville, 323 U.S. 192	7
Trailmobile Co. v. Whirls, 331 U.S. 40	7
Statutes	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(a)	3
Section 8(b)	3
Section 9(a)	3
28 U.S.C. 1254(4)	1
Miscellaneous	
Federal Rules of Civil Procedure:	
Rule 12(b)	2

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C) is reported at 303 F.2d 182. The opinion of the District Court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court below (Pet. App. A) was entered on May 16, 1962. A petition for rehearing was filed on June 8, 1962, and was denied by the court below on June 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The complaint alleges that petitioners and other members of their class are employees whose seniority rights under a collective bargaining agreement have been adversely affected by an agreement, dated May 28, 1959, between their employer and their collective bargaining representative pursuant to which a system-wide seniority plan was placed into effect and made retroactive to June 1, 1957, the date that separate divisions of the employer were merged into a single system-wide operation. Before the May 28, 1959 agreement, seniority was accumulated only on a division-wide basis. The District Court, treating a motion to dismiss as a motion for summary judgment under Rule 12(b) of the Federal Rules of Civil Procedure, dismissed the complaint, and the court below affirmed. The question presented is:

Whether the complaint, exhibits and other factual materials presented to the District Court show that there is no genuine issue of fact as to the absence of improper motivation in entering into the system-wide agreement with a retroactive effective date of June 1, 1957.

STATUTES INVOLVED

The statutory provisions upon which petitioner's claim rests appear to be the following sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 8(a). It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a).

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

STATEMENT OF THE CASE

The facts upon which the District Court and Court of Appeals reached their conclusions are presented in the complaint, a stipulation of facts, exhibits, and an offer of proof made at the hearing on a motion to dismiss the complaint, which was treated as a motion for summary judgment. These facts, all of which are contained in the record before this Court, may be summarized as follows:

Prior to May 28, 1959, the collective bargaining agreements which covered employees of the predecessors of respondent Western Greyhound Lines provided for seniority upon a divisional basis, i.e., seniority rights could be asserted only within the geographical division where an employee was stationed (Compl. 3). Thus, contract rights which flowed from seniority, including the right to bid for jobs, were subject to exercise only within the particular geographical division in which an employee worked. On May 28, 1959, the bargaining representative of these employees and respondent Western Greyhound Lines entered into a new agreement establishing system-wide seniority, i.e., a program under which seniority rights could be exercised throughout the Western Greyhound Lines operations in eleven western states (Compl., par. VI). The new seniority plan was made effective as of June 1, 1957, the date upon which the various divisions, into which the eleven western states had previously been divided were merged, and Western Greyhound Lines became the single operating organization of Greyhound Corporation for that area (Stip. of Facts).

Under the agreement of May 28, 1959, employees retained their divisional seniority which had been accumulated prior to June 1, 1957, and thus their seniority status within their division remained unchanged (Exh. to Compl.). Employees hired after June 1, 1957, on the other hand, earned seniority rights under the May 28 agreement only on a system-wide basis. Thus, employees hired after June 1, 1957, but before the agreement of May 28, 1959—the class of employees on whose behalf petitioners instituted the present action—in effect had their existing divisional seniority standing converted, as of May 28, 1959, into system-wide seniority, which for the first time both subjected them to the competition of

more senior employees in other divisions within the system, and also gave them a competitive advantage *vis a vis* less senior employees throughout the system. Employees hired after May 28, 1959, of course had no divisional seniority which could be affected by the agreement, and earned only system-wide seniority. The seniority provision of May 28, 1959 was ratified by the employees affected as part of a more comprehensive agreement reached between their representative and Western Greyhound Lines (Compl. par. VIII).

The complaint alleges that the May 28 agreement "unfairly, arbitrarily and capriciously deprived each of the aggrieved employees of valuable seniority rights by placing above each of the aggrieved employees on said employee's Divisional seniority list, all of the employees of Greyhound with prior seniority dates" (Compl. par. VIII). In response to an inquiry during the hearing before the District Court as to the evidence that would be adduced in support of these allegations, petitioners' counsel made an offer of proof that employees hired between June 1, 1957 and May 28, 1959 had been "told that the specific division into which they were employed would be retained by them throughout their employment if they so desired" (Pet. App. C, p. xiv). No other factual evidence was mentioned.

The District Court, treating respondents' motion to dismiss as a motion for summary judgment, granted the motion. The Court concluded that respondents had shown by the exhibits and stipulations of fact, viewed in the light of the complaint and petitioners' offer of proof, that no genuine issue of fact existed as to the absence of malice or an invidious intent to discriminate against members of petitioners' class (Pet. App. B, p. iv). The court noted that "an employee does not have a vested nor inherent right

to seniority in service," and that the agreement of May 28, 1959 was "entered into after an opportunity on both sides to present and voice their differences and individual members . . . were permitted to cast their ballot . . . ." (*ibid.*). The court also observed that some members of the class on whose behalf the complaint was filed "will be adversely affected by the modification sought by [petitioners]" (Pet. App. B, p. ii).

The court below affirmed the District Court's judgment. Fully recognizing the legal requirement that the bargaining representative must act on behalf of all employees in the unit in good faith, and without "hostile discrimination," the court below held that "an essential element" in a case seeking to invoke this principle is a showing of "a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership" (Pet. App. C, p. xii). The court further held that "The complaint nowhere alleges that the union representatives had a bad faith motive or intent, or purpose in selecting June 1, 1957, rather than May 28, 1959" in adopting system-wide seniority, and also that "Nowhere in the material outside the complaint . . . do facts or allegations appear which show or tend to show any improper motive or purposeful discrimination" (*id.*, p. xiv). On the contrary, the opinion of the court below states that "undisputed facts do appear in the stipulation of facts entered into by the parties which show that in fact there was a rational basis upon which to select June 1, 1957" (*id.*, p. xvii). As summarized in the opinion, "The entire record before this court—the complaint, stipulations, offer of proof and affidavits—does nothing more than establish that there is a difference of opinion between portions of the union membership" (*id.*, p. xv).

ARGUMENT

1. The petition does not present a legal question relating to the obligation of a collective bargaining representative to represent employees fairly and impartially. Thus, the petition does not contest the correctness of the holding below that the conversion from a division-wide seniority arrangement to a system-wide seniority does not, of itself, constitute a breach of the trust which is vested in the bargaining representative, even though the advantages of such a change may weigh unevenly on various groups of employees. See *Trailmobile Co. v. Whirls*, 331 U.S. 40; *Ford Motor Co. v. Huffman*, 335 U.S. 330. Nor does the petition contest the validity of the legal principle, applied by the District Court and the Court of Appeals that a showing of hostility or bad faith as to a particular group of employees is an essential element in the cause of action which the complaint herein attempts to state. See *Steele v. Louisville*, 323 U.S. 192; *Ford Motor Co. v. Huffman*, *supra*. As the petition correctly states, "if petitioners are to prevail at a trial, they will have to prove the hostility and bad faith of the respondents" (Pet. 11). Accordingly, the single question presented is whether the court below could properly conclude on the basis of the factual materials before it, viewed in the light of the allegations of the complaint and petitioners' offer of proof, that there is no genuine issue of fact in this case as to the absence of any such hostility or bad faith as to the employees in the class represented by petitioners.

The foregoing question does not warrant review by this Court. In affirming the judgment of the District Court, the court below expressly recognized "the rule that summary judgment is not to be granted unless no genuine issue as to any material fact is presented to the court" (Pet. App. C, p. xvii). Thus, the determination of the question presented

involves neither a misunderstanding of the applicable procedural rule nor a question of substantive legal policy, but only the consideration of the particular pleadings and factual situation which are peculiar to this case. Decision by this Court in these circumstances would have no significance beyond this case. Accordingly, the question presented falls into the class which this Court traditionally has permitted to be finally resolved by the courts of appeals.*

2. In any event, the question presented was correctly decided below. The selection of the June 1, 1957 date as the time for the system-wide seniority plan to take effect—the single aspect of the agreement of May 28, 1959 of which petitioners complain—was keyed to the merger of the pre-existing divisions into a system-wide operation. As stated by the court below, "The date for creating system seniority was the same date when the system itself was created" (Pet. App. C, p. xvi). The reasonableness of synchronizing the adoption of system-wide seniority with the establishment of system-wide operations is self-evident, and both negates any suggestion of bad faith and shows "that in fact there was a rational basis upon which to select June 1, 1957" (Pet. App. p. xvii).

Petitioners' argument, bolstered by reference to a California Public Utilities Commission decision approving the merger of June 1, 1957, that Greyhound's organizational changes as of that date did not involve operational changes, does not offset the manifest reasonableness of utilizing the

*Petitioner's assertion (Pet. 10) that the decision below is in conflict with rulings of the Court of Appeals for the Second, Third and Sixth Circuits is entirely without merit. The decisions so relied on involved different pleadings and different facts, from which those courts concluded that factual questions were presented which warranted trial. Dissimilar pleadings and facts scarcely form a tenable basis for arguing that a motion for summary judgment should be denied in a different case.

merger date for conversion to system-wide seniority. A change in the organizational structure of an employer may be regarded as of importance in adjusting seniority rights, no less than a change in an employer's operation. In any event, the absence of a change in operations on June 1, 1957 scarcely gives rise to an issue of fact as to whether that date was selected out of hostility to a particular group of employees.

Moreover, any inference of such hostility is precluded by the circumstance that the June 1, 1957 date may well benefit employees who were hired thereafter. Such employees, by virtue of the system-wide seniority agreement, obtained the theretofore non-existent right to exercise seniority standing in other divisions as well as in their own, and it is not subject to challenge that many such employees have actually asserted this right to bid for jobs elsewhere in the Western Greyhound Lines system. It is of course also true that employees elsewhere in the system who have greater seniority are in a position to exercise rights as against the class of employees represented by petitioners. The upshot of the variegated pattern in which the new seniority provisions may manifest themselves is that some employees may be disadvantaged and others will be greatly benefited. It is impossible to predict how the system will work in any individual case, but that circumstance alone is sufficient to dispel any inference of an invidious intent to discriminate against a particular class of employees.

The foregoing undisputed facts, moreover, are to be viewed in the light of the allegations of the complaint, which do not charge petitioners with malice or bad faith. The complaint alleges only that the selection of the June 1, 1957 date was arbitrary, unfair and capricious, all of which are allegations of legal conclusions, and do not by

themselves create issues of fact. See, *Colbert v. Brotherhood of Railway Trainmen*, 206 F.2d 9 (C.A. 9), certiorari denied, 346 U.S. 931. Finally, at the hearing on respondents' motion in the District Court, petitioners were able to suggest no relevant facts that could be proven in support of their argument that respondents acted out of bad faith.

In sum, respondents presented facts in support of their motion which revealed a rational basis for selection of June 1, 1957 as the effective date for system-wide seniority, and which precluded any issue of fact as to the absence of bad faith in their decision. Petitioners, in response to this showing, presented no facts, and referred to no evidence which could reasonably be the basis for creating an issue of fact in this respect. Accordingly, the record plainly supports the summary judgment requested by respondents, and the court below correctly affirmed the District Court's ruling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

NEYHART & GRODIN
DUANE B. BEESON
Attorneys for Respondents D. L. Rhodes, J. Adornetto and Jack Banta

October, 1962.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco—ss.

Clarence Krieger, being first duly sworn, says:

That he is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 180 First Street, San Francisco, California

that affiant served a copy of the attached Brief of D. L. Rhodes, J. Adornetto and Jack Banta in Opposition on each of the following; by placing same in an envelope addressed (respectively) as follows:

Three Copies:
Jay A. Darwin
Darwin, Rosenthal & Leff
68 Post Street
San Francisco 4, California

Three Copies:
Marion B. Plant
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco 4, California

that each of said envelopes was then, on October 12, 1962 sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

Clarence Krieger

Subscribed and sworn to before me

this 12 day of October, 1962

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires July 5, 1965